U.S. Department of Labor

Office of Administrative Law Judges
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Date: June 26, 2000

Case No.: 1999-LHC-2294

OWCP No.: 07-152504

In the Matter of

WILLIAM CARRIER

Claimant

v.

JOHNSON RIG BUILDERS, INC.

Employer

APPEARANCES:

PETE LEWIS, ESQ.
For the Claimant

TED WILLIAMS, ESQ.
For the Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by William Carrier (Claimant) against Johnson Rig Builders, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of

Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on January 22, 2000 in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered ten (10) exhibits while Employer proffered two (2) exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer on March 27, 2000 and March 17, 2000, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on April 3, 1998.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on April 3, 1998.

5. That Employer filed a Notice of Controversion on May 14, 1999.

6. That Claimant received temporary total disability benefits from April 3, 1998 through September 3, 1999, in a total amount of $44,200.00.

7. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

8. That Claimant's average weekly wage at the time of injury

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

was $1,457.61.[2]

II. ISSUES

The unresolved issues presented by the parties are:

1. Jurisdiction.

2. Nature and extent of disability.

3. Average weekly wage.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant, who was 32 years old at the time of the hearing, graduated from high school in 1985, started ironworking in 1986, completed a four year apprenticeship in the Ironworkers Union in 1990 and has since worked as a journeyman ironworker. (Tr. 22). He currently lives in Shreveport, Louisiana. Id. In 1992, Claimant started working out of the Stagehands Union as a stagehander, but has since quit stagehanding. (Tr. 24). Through his union membership, he began working as a derrick builder. (Tr. 23-24). He testified that stagehanding and derrick building involved climbing and lifting heavy loads. (Tr. 25).

Claimant also testified that over the years, he has worked for numerous United States derrick rig-building companies, including DRECO, Johnson Rig Builders (Employer) and Crown Derrick. (Tr. 26-27). Claimant's first job with Employer was located in Holland while on navigable waters. (Tr. 28-29). The job, which occurred while "in tow in the North Sea," involved placing material around the derrick to keep oil from leaking into the water. (Tr. 29).

Claimant's second job with Employer involved dismantling a derrick in Sabine Pass, Texas. (Tr. 30). He testified the derrick was located on land, "sitting adjacent to the vessel," which was in the water. (Tr. 31). Following this job, Claimant went to Cameron, Louisiana to "take the top out of a derrick." Id. He testified that this derrick was located on the vessel in water. (Tr. 32). Thereafter, he performed a job out of Port Fouchon,

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[2] At the hearing, the parties stipulated to Claimant's average weekly wage. See Tr. 6-7.

Louisiana for Crown Derrick. Id.

Subsequently, Claimant traveled to Scotland for a Load Master job, which involved reinforcing a derrick and lasted approximately five or six weeks. (Tr. 33). The derrick on this job was located in the North Sea on a semi-submersible drilling rig, which was under tow and coming into Invergordon Port. (Tr. 34). He claimed he worked on navigable waters during the duration of the job. (Tr. 35). Thereafter, he returned to Holland in the Velrome Botlek Shipyard for another job with Employer, which involved applying apparatuses to a derrick. Id.

Claimant's most recent job took him to Singapore, at which time he was injured while building two derricks for Employer. (Tr. 36-37). The derricks were located in a shipyard, not on vessels. (Tr. 37). On April 3, 1998, Claimant slipped and fell approximately 50-60 feet to the drill floor and into the substructure. (Tr. 40). He was immediately taken to a hospital in Singapore and eventually airlifted to a hospital in Shreveport, Louisiana. (Tr. 41). As a result of this accident, Claimant suffered a broken left femur, a ruptured spleen, a torn colon, six broken ribs, a separated AC joint in his shoulder, a punctured lung, a left knee injury, a gash from his stomach around to his back and some cuts on the back of his head. Id. Upon returning to the United States, Claimant began treating with Dr. Thomas Edwards, an orthopaedic surgeon. Id. Claimant testified that Dr. Edwards has not released him to return to any gainful employment. (Tr. 42).

Claimant explained that because of the collapsed lung condition, he was not able to fly on an airplane until approximately two and a half weeks after the accident occurred. (Tr. 42). Upon returning to Shreveport, Dr. Edwards performed surgery on Claimant's knee and shoulder. (Tr. 43). Following a nerve study, Dr. Edwards suggested performing a nerve transposition surgery on Claimant's elbow. (Tr. 44). In April or May 1999, Claimant underwent the ulnar nerve transposition on his left elbow and had the plate removed where his femur had been fractured. Id.

Claimant testified that he was involved in physical therapy from May 1998 through August 1999 and would still be attending "if [he] didn't feel guilty about the [therapist] not getting paid for it." (Tr. 45). He further testified that early on in his medical treatment, Employer's owner, Bill Johnson, encouraged him to be frugal with medical expenses since he was paying out of pocket. Id. Currently, Claimant is taking Celebrex and continues to experience constant pain in his leg and knee. Id. He cannot stand for more than 20 minutes at a time before pain setting in. (Tr.

46). During the hearing, the undersigned observed Claimant's knee, which appeared to exhibit "a lot of instability, and you can move it back and forth." (Tr. 47). Claimant was told by Dr. Edwards that he would be a good candidate for a knee replacement. Id.

Following the accident, Claimant took a position as an officer of the Stagehands Union in July 1998, which entails checking the answering machine at the office, returning any phone calls to perspective users of stagehands and dispatching workers to different sites. (Tr. 48-49). He testified that this position paid $900 per month. (Tr. 49). Claimant ceased working this position with the union on January 1, 2000. Id.

Claimant further testified that when his compensation benefits were reduced or becoming "sporadic," he looked for "any kind of thing [to] do." (Tr. 50). He sometimes accepted work as a rigger, which involved overseeing rigging jobs and working "on the ground." (Tr. 51). Additionally, he claimed that he cannot perform the former duties of his employment. (Tr. 52). He currently remains under the treatment of Dr. Edwards. Id.

On cross-examination, Claimant re-affirmed that he became a journeyman in 1990. (Tr. 52). Claimant testified that while he worked as an ironworker, he worked "job to job...with various employers." (Tr. 53). While his work was through the Stagehand Union, he also considered his work "very job to job." (Tr. 55). He explained that while working as a derrick builder for Employer, he rarely built platforms, drill floors or jack-up rigs. (Tr. 56). Claimant classified his derrick work as "job to job." (Tr. 57). He further explained that once a job is completed, he essentially does not work for that particular employer anymore until an employee is assigned another job. (Tr. 59).

In the year prior to his accident, Claimant worked as a rigger, prop man and truckdriver for the Shreveport Symphony Opera. (Tr. 61). He explained that the jobs he worked in the Gulf of Mexico and in Scotland for Crown Derrick and Load Masters, respectively, were in navigable waters and definitely beyond three miles of the coastline. (Tr. 70-72). In between the derrick building jobs, he worked as a stagehand out of the Stagehand Union in Shreveport. (Tr. 72).

Claimant testified he had been in Singapore for about two and a half weeks before he was injured. (Tr. 73). He stated that Employer's owner, Mr. Johnson, requested Claimant to work this particular job. (Tr. 74). Claimant explained that this job involved construction of the first derrick, which was already more than half completed, and building an entire second derrick. (Tr.

75). When he arrived in Singapore, the first derrick was in two pieces. Id. He testified that the crew performed "a little bit of work on it...hooked it onto a barge" and floated around to the Far East Limited Shipyard. Id. Claimant explained that while hooking it up to the barge, the crew was located in "a little site on the water." (Tr. 75-76). He further explained that at this site, the crew "had enough room to assemble these derricks and [Employer] could still get in there and grab them with a barge." (Tr. 76). Subsequently, the crew began working on the second derrick. Id. A few days later, the crew returned to the first derrick in the Far East Limited Shipyard to set the drill floor. Id. It was on this derrick that Claimant injured himself. Id. He also explained that he and the rest of the crew were responsible for securing the completed derrick to the drill floor. (Tr. 79-80). However, he did not have anything to do with placing the drill floor onto the jack-up rig or barge. (Tr. 81).

Claimant also testified that while in Singapore, he lived in a hotel on land. (Tr. 82). Additionally, all work performed in Singapore took place on land. (Tr. 83).

In response to the undersigned's questioning, Claimant testified that the derrick work he performed for various employers was through "word of mouth." (Tr. 83). He explained that the rig companies would call Claimant to request him for the job. Id. At the time of his accident in April 1998, Claimant was installing the track braces used to fasten the sides of the derrick to the drill floor which was located about 20 feet from the water line. (Tr. 84-85).

Medical Evidence

Thomas A. Edwards, M.D.

Dr. Edwards, an orthopaedic surgeon, first treated Claimant on April 17, 1998, approximately two weeks after the accident occurred in Singapore. (CX-4, p. 36). At that time, he noted that Claimant was disabled due to his leg, shoulder and arm conditions. (CX-4, p. 37). During the last two years, Dr. Edwards has performed multiple surgeries on Claimant's elbow, leg, shoulder and knee. (CX-4, pp. 14, 26-30). Based on Dr. Edwards' medical records, it is clear that Claimant underwent additional conservative treatment. Moreover, Claimant has continued to be treated for ongoing symptoms every four to six weeks. It should be noted that Dr. Edwards has not opined that Claimant reached maximum medical improvement, nor has he released him to return to his former employment.

Vocational Evidence

Bobby S. Roberts

Mr. Roberts, a certified vocational rehabilitation specialist, evaluated Claimant on September 29, 1999 at the behest of Claimant's attorney. (CX-2, p. 19). Based on the results of Mr. Roberts' evaluation, he noted that "it is readily apparent that [Claimant] is never going to return back to his heavy to very heavy work as a stagehand or ironworker." Mr. Roberts opined that Claimant's earning capabilities can only be enhanced by attending some type of training program and that without such training, he will be "highly limited in the future and will have a reduction of over 75% in his wage earning capability." (CX-2, pp. 18-19).

Contentions of the Parties

Claimant argues that his injury occurred in a situs covered by the Act. He contends that the 1972 Amendments establish clear Congressional intent to extend coverage of the Act landward. Furthermore, he relies on jurisprudence, in particular, Kollias v. D&G Marine Maintenance, 29 F.3d 67 (2d Cir. 1994), Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc., 788 F.2d 264 (5th Cir. 1986) and Cove Tankers Corp. v. United Ship Repair, 683 F.2d 38 (2d Cir. 1982) for the proposition that injuries which occur extraterritorially are covered under Section 3(a). Additionally, Claimant analogizes the present matter to Weber v. S.C. Loveland Co., 28 BRBS 321 (1994) to support his contention that American workers injured in foreign ports and involved with American flag vessels are covered under the Act. Finally, he argues that if situs coverage is found, he has not yet reached maximum medical improvement, cannot return to his former employment as a rigbuilder and thus remains temporarily and totally disabled.

Employer, on the other hand, maintains that Claimant's injury did not occur on a situs covered by the Act. It contends that none of Claimant's work in Singapore was performed on territorial waters of the United States or on the high seas, but rather in a foreign nation. Employer relies on the Kollias case, stating that the reference to "high seas" in Section 939(b) creates a presumption that extends coverage of the Act extraterritorially to the high seas and thus, emphasizes the need for uniform coverage. Employer argues that Claimant's reliance on the Weber case is misplaced since the BRB "ignored or glossed over" the Kollias presumption against extraterritorial coverage. Alternatively, Employer contends that even if Weber is correct, the rationale behind the decision is insufficient to extend coverage from port waters of a foreign nation to the land of that nation. Finally, Employer

agrees that if Claimant is held to be covered under the Act, he has not reached maximum medical improvement and has not been released to return to any type of gainful employment.

DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Banks v. Chicago Grain Trimmers Assn., Inc., 390 U.S. 459, 467 (1968); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981).

A. Jurisdiction

To establish jurisdiction and coverage under the Act, a claimant must meet both the "situs" and "status" requirements of the Act.

1. Situs

Section 903(a) provides:

> "Compensation shall be payable...in respect of disability or death of an employee but only if the disability or death results from an injury occurring **upon the navigable waters of the United States** (including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily used by employer in loading, unloading, repairing or building a vessel)."

33 U.S.C. § 903(a) (emphasis added). Furthermore, the situs

requirement compels a factual determination that cannot be hedged by the labels placed on an area, but the site must have some nexus with the waterfront. Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980).

In brief, both parties maintain that the essential issue is whether Claimant's site of injury is covered by Section 3(a) of the Act. As noted above, the injury is covered under the Act if the derrick on which Claimant was working was in "the navigable waters of the United States, including any...adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a). In determining whether Claimant meets the situs requirement under the Act, it is necessary to trace the development of the jurisprudence of the Act's coverage for injuries occurring extraterritorially.

The Supreme Court has cautioned that we must "take an expansive view of the extended coverage" of the Act. Sisson v. Davis & Sons, Inc., 131 F.3d 555, 557 (5th Cir. 1998) (citing Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 274 (1977)). The Fifth Circuit has also recognized Congress' purpose in amending the Act in 1972, which was to expand coverage, apply uniform standards, cover on-shore maritime duties and reduce the number of employees walking in and out of coverage. Sisson, 131 F.3d at 557 (citing P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979). Additionally, the Fifth Circuit has held, in keeping with the spirit of congressional purpose, that "so long as the site is close to or in the vicinity of navigable waters, or in a neighboring area," an employee's injury can come within the Act's situs requirement that it "adjoin" navigable waters. See Winchester, supra.

In Texports Stevedore Co. v. Winchester, the claimant was injured in a stevedore gear facility which was located five blocks from the gate of the nearest dock. While in the course of his employment, he tripped in the gear room and injured himself. The court observed that "many longshoremen moved continually from shore to sea, in and out of state and federal coverage, during the day" and that the Act's situs requirement is not amenable to definition by the use of fixed lines, but that "[t]he site must have some nexus with the waterfront." Id. at 510-515. Furthermore, the court noted that reliance on "hard lines...would frustrate the congressional objectives of providing uniform benefits." Id. Thus, it was held that a broad interpretation of the maritime situs requirement **reduces** the number of workers walking in and out of coverage and **promotes uniformity**. Id. at 516. The Fifth Circuit opined that a broad interpretation "is in line with the congressional desire to extend coverage to those maritime chores

that technology has moved ashore." Id.

In Cove Tankers, which is cited in brief by both parties, the Second Circuit found coverage for one injured worker and one worker killed while working on an employer's ship on the high seas. Cove Tankers, 683 F.2d at 42. In this case, the injuries occurred while aboard a United States vessel moving from Philadelphia, Pennsylvania to New York, New York, both American ports. Id. at 39. During the run, the vessel deviated off course by about 135 miles into the high seas. Id. The Court observed that there existed a congressional intent to not allow "a mere eccentricity to frustrate the uniform standard of coverage" and held that because the vessel deviated onto high seas for a portion of its trip, "such a circumstance should not place a covered employee or his dependents in jeopardy of losing immediate statutory compensation under the Act." Id. at 42. Finally, the Court noted that "any other result...would revitalize the shifting and fortuitous coverage that Congress intended to eliminate." Cove Tankers.

In Reynolds, the Fifth Circuit extended coverage to a claimant injured during sea trials for a vessel while on the high seas. Reynolds, 788 F.2d at 265. The court held that navigable waters may include the high seas and that employers should not be able to avoid liability by shifting into non-covered territory. Id. Rather, the Court again observed that the language of the 1972 Amendments is broad and suggested taking an expansive view of the extended coverage. Id. at 271. It was further noted that longshoremen, like Reynolds, may on occasion have their jobs carry them to traditionally "non-covered" territories, but such shifting should not cause them to lose their protection under the Act. Id. at 272.

The Second Circuit revisited this issue again in Kollias, in which it was held that although the Act was subject to a presumption against extraterritoriality, Section 39(b) of the Act contains a sufficiently clear indication that Congress intended for it to be applied beyond the territorial jurisdiction of the United States, including on the high seas. 29 F.3d at 73-74. Furthermore, the Second Circuit observed that Congress' overriding purpose in enacting the Act was to provide consistent workers' compensation coverage to eligible longshore and harbor workers, "a goal that would be frustrated by limiting the [Act] to territorial application." Id. at 74.

In the present matter, Employer argues that the Kollias presumption against applying the Act extraterritorially has not been overcome. Additionally, Employer maintains that the Board's analysis in Weber is flawed since "it ignores or glosses over the

presumption against extraterritorial coverage."

Claimant relies on Weber, a Board case, in which an American employee of an American company was injured aboard a barge in the foreign port of Kingston, Jamaica. 28 BRBS at 322. The Board held that in keeping with the policy concerns expressed by various courts regarding uniform coverage and protection for American workers in foreign ports, coverage under the Act extended to the claimant. It was further noted that **when an injury occurs in territorial waters of a foreign nation and claimant is a citizen of the United States, employer is based in the United States, the ship was under American flag, no choice of law issue was raised by the parties and the claimant meets the status requirement of the Act, the Act applies**.

With respect to the Kollias presumption, Claimant asserts that because the 1972 Amendments extended the "navigable waters" line to include the high seas, the presumption against extraterritoriality was overcome.

While the court's decision in Kollias clearly indicates an expansion of jurisdiction under the Act, it does not specifically address whether the Act extends to a longshoreman injured in foreign territorial waters or in a foreign port. In light of Sisson, I find that the Fifth Circuit has recognized that the Kollias presumption has been overcome. Under Supreme Court precedent, the Fifth Circuit has found a sufficiently clear indication that Congress intended for the Act to be applied beyond the territorial jurisdiction of the United States. See Caputo, supra. Furthermore, the Fifth Circuit has acknowledged that the congressional purpose in enacting the Act was to provide uniform coverage to longshoremen and harbor workers who walk in and out of coverage throughout the day. See P.C. Pfeiffer, supra. Thus, I find Employer's argument meritless in view of the Fifth Circuit's recognition that the Kollias presumption has been overcome, as stated in Sisson.

It should also be noted that in briefly reviewing the Jones Act, 46 U.S.C. § 688 et seq., and the Death on the High Seas Act (DOHSA), 46 U.S.C. § 762 et seq., it is clear that federal courts have extended coverage to individuals injured in foreign territorial waters. Although the cases under those Acts are not binding on this court, they nevertheless indicate a trend in admiralty law towards extending coverage to those who are injured or killed in foreign territorial waters. See Weber, 28 BRBS at 329. Undoubtedly, the rationale for extending coverage under the Jones Act and DOHSA is similar to the rationale of the Kollias and Reynolds courts, that is, the enforcement of a uniform system of

coverage that does not depend on the place of injury. Id. This strongly buttresses my conclusion that the presumption against applying the Act extraterritoriality has been overcome. Furthermore, based on the analogous facts of the Weber case, I find that the Act is applicable because (1) Claimant was in the territory of a foreign nation; (2) he is a United States citizen; (3) Employer is an American company; (4) no choice of law issue was raised; and (5) Claimant meets the status requirement of the Act. Therefore, I find not only has the presumption against extraterritoriality been overcome, but in light of Claimant's circumstances, the Act is clearly applicable.

Employer also argues based on the rationale of Cove Tankers, Reynolds and Kollias that Claimant is not covered under the Act because (1) he was hired on a job-to-job basis; (2) he did not work continuously for the same employer; (3) his job in Singapore was expected to last five or six weeks; (4) none of his work in Singapore was performed on territorial waters of the United States or on the high seas; and (5) he had no expectation of being re-hired by Employer.

Claimant maintains that if he had been injured on Employer's project in Sabine Pass, Texas, where the derrick was on the land next to water, there would be no question of jurisdiction. He claims that because he is an American citizen who was injured while working for an American employer, building a derrick for an American vessel, he should be covered under the Act.

I find Cove Tankers, Reynolds and Kollias distinguishable from the instant matter in that each of the claimants in these cases were longshoremen injured aboard a vessel on the high seas. Conversely, Claimant, in the present matter, was not injured on the high seas, but rather, while working in a port in Singapore. However, in each of the aforementioned cases, the Second and Fifth Circuits found coverage under the Act was extended extraterritorially to the claimants, who were longshoremen. The finding that the claimants in Cove Tankers, Reynolds and Kollias were covered by the Act further supports my conclusion that the overriding congressional purpose in enacting the Act was to provide uniform coverage to longshoremen and harbor workers who walk in and out of coverage, including while fortuitously on the high seas.

With respect to Employer's five reasons why coverage under the Act should not be afforded to Claimant, I find these reasons unpersuasive. Employer relies on Claimant's credible testimony that he was hired on a job-to-job basis, did not work continuously for the Employer, had no expectation of being re-hired by Employer, his job in Singapore was expected to last five or six weeks and

none of his work in Singapore was performed on territorial waters of the United States or on the high seas. However, the very nature of longshore work is "job-to-job" and sporadic.[3] Longshoremen typically belong to unions or "shape up" at hiring halls and their work assignments are largely determined by what type of work is available at any given time. Jobs may last one day or one year. See e.g., Harbor Tug & Barge Co. v. Papai,[4] 502 U.S. 548 (1997).

Although Claimant did not work continuously for Employer and had no expectation of being re-hired, he credibly testified that he had worked as a derrick builder for Employer on five different occasions, three of which were in foreign countries. He also worked as a derrick builder for other companies, including Crown Derrick and Load Masters. Although he had no expectation of being re-hired, he explained that derrick building is dangerous work and derrick builders are hard to find. (Tr. 56). He also testified that once an employee has been hired as a derrick builder by one company, that company tends to re-hire them for future jobs. (Tr. 57).

Therefore, in light of the very nature of longshore work and Claimant's credible testimony, I find Employer's argument meritless and conclude that Claimant is not precluded from coverage under the Act based on the fact that he was hired on a job-to-job basis, did not work continuously for the Employer, had no expectation of being re-hired by Employer and was expected to work this particular job for five or six weeks.

With respect to the argument that Claimant's work was not performed on territorial waters of the United States or on the high seas, I find this argument unpersuasive. Since Claimant was not

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[3] William Davy Pool, a derrick and rig builder, was deposed by the parties on October 28, 1999 in Lafayette, Louisiana. (CX-3). He testified that within the rig building industry, employment is typically "job to job." (CX-3, p. 9). Although Mr. Pool owns his own business, he still accepts jobs from contractors who are seeking employees to aid in completion of certain jobs, such as, building or modifying a derrick. (CX-2, p. 17).

[4] In Papai, the claimant received various waterfront-related work assignments through his membership in a local union hiring hall. Over the years, he worked for various employers doing maintenance, longshore and deckhand work. Claimant had been hired to paint a vessel, a one day job, when he was injured. Prior to his injury, he had worked for Employer on twelve separate occasions in two and a half months. Id.

directly on territorial waters or high seas, it must be determined whether the site at which he was injured was close to or in the vicinity of navigable waters, or in a neighboring area, and thus, would enjoy coverage under the Act's situs requirement that it "adjoin" navigable waters. See Winchester, supra.

Claimant credibly testified that he was working on two derricks: one was almost finished and the second had to be built. (Tr. 75). When he arrived in Singapore, the first derrick was in two pieces. Id. He testified that the crew performed "a little bit of work on it...hooked it onto a barge" and floated around to the Far East Limited Shipyard. Id. Claimant explained that while hooking it up to the barge, the crew was located in "a little site on the water." (Tr. 75-76). He further explained that at this site, the crew "had enough room to assemble these derricks and [Employer] could still get in there and grab them with a barge." (Tr. 76). Subsequently, the crew began working on the second derrick. Id. A few days later, the crew returned to the first derrick in the Far East Limited Shipyard to set the drill floor. Id. It was on this derrick that Claimant injured himself. Id.

I find the matter at hand similar to Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977), on which Claimant relies. In Kininess, a shipbuilding employee was injured while performing maintenance work on the employer's crane at a shipyard prior to the use of the crane in shipbuilding activities. The employer argued that because the back lot in which the employee was working did not abut the water, it was not a maritime situs and thus not covered under the Act. Id. at 178. The Fifth Circuit held that because the lot (1) was part of the shipyard, (2) was not separated from the waters by facilities used for shipbuilding and (3) was customarily used for the maintenance and repair work which was directly related to shipbuilding, Claimant met the situs requirement. Id.

In light of Claimant's credible testimony and the Kininess case, I find that Claimant was injured at a site that was close to or in the vicinity of navigable waters, or in a neighboring area. Although he testified that the area in which he was working was "not really a shipyard," he was working at a site located on water. He was unaware of whether this area was owned by the Far East Limited Shipyard. The site, however, was clearly used for shipbuilding,[5] as the derrick which was being built was hooked onto

[5] This is further buttressed by the testimony of Mr. Pool, who was present in Singapore during the derrick construction. He credibly testified that the derrick on which the crew was working was to become part of a jack-up rig owned by an American company.

a drilling or jack-up barge.[6] Additionally, the record is devoid of any demonstrative evidence that the site was totally separated from the shipbuilding facilities. To the contrary, Claimant testified that he was working in an area onto which the barges could come in an "grab" the derricks.[7] Accordingly, I find that Claimant has met the situs requirement and thus, is entitled to coverage under the Act because the site in which he was working is on the water or "adjoins" navigable waters.

2. Status

Additionally, for proper coverage under the Act, the claimant must also establish "status" under Section 2(3) of the Act. Although Claimant states that "there is no dispute that Claimant was an employee under 33 U.S.C. § 902(3)," and Employer fails to address the status issue completely. Therefore, the undersigned will nevertheless briefly analyze whether Claimant meets the status requirement under 33 U.S.C. § 902(3).

Section 2(3) of the Act provides:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net."

33 U.S.C. § 902(3).

A claimant may establish status by showing that he is engaged in one of the activities listed in Section 2(3). The Supreme Court has also extended employee status based upon a determination that

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(CX-3, pp. 30-31).

[6] It should be noted that a jack-up drilling rig is considered a vessel for purposes of admiralty law. Marathon Pipe Line v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 233 (5th Cir. 1985).

[7] Additionally, Mr. Pool testified that the rig to which the derrick was being secured was located on a dock, next to water. (CX-3, pp. 40-41).

their activities fall into the general category of maritime employment. Caputo, supra; Ford, supra; Chesapeake & Ohio R.R. v. Schwalb, 493 U.S. 40 (1989).

In short, the Supreme Court has clearly decided that "aside from the specified occupations, land-based activity occurring within the Section 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." Schwalb, supra; Munguia v. Chevron U.S.A., Inc., 999 F.2d 808 (5th Cir. 1993). Furthermore, status may be based either upon the maritime nature of the claimant's activity at the time of his injury or based upon the maritime nature of his employment as a whole. Thibodeaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978); Universal Fabricators, Inc. v. Smith, 878 F.2d 843 (5th Cir. 1989).

In the present matter, Claimant was hired as a derrick builder. The testimonial evidence established that the derrick on which Claimant was working and was injured was to be secured onto a jack-up drilling barge, which is considered a vessel. See Marathon Pipe Line, supra. In light of the foregoing, I find that Claimant participated in an essential or integral part in the construction of a vessel and thus, his work was indubitably related to maritime activity.

Furthermore, longshoremen are defined as "persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." Boudloche v. Howard Trucking Co., 632 F.2d 1346 (5th Cir. 1980). Claimant credibly testified that he and the crew with whom he was working in Singapore were responsible for constructing two derricks and securing the completed derricks on vessels. (Tr. 79-80). Claimant's testimony is further buttressed by Mr. Pool's testimony that the derricks on which the crew were working were to become part of vessels, which were owned by an American company. (CX-3, pp. 30-31). In light of the testimonial evidence of record, I find that Claimant spent at least some of his time in indisputably longshoring/shipbuilding operations, i.e. construction of a vessel.

Based on the foregoing, I find that Claimant meets the status requirement under Section 2(3) of the Act. Therefore, since I find that Claimant meets both the situs and status requirement, he has properly establish jurisdiction under the Act.

B. Nature and Extent

The parties stipulated that Claimant suffered multiple injuries on April 3, 1998 when he fell 50-60 feet from the derrick on which he was working. However, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant's treating physician, Dr. Edwards, has not rendered an opinion that Claimant has reached maximum medical improvement. Additionally, Dr. Edwards' medical records do not indicate that Claimant was ever released to return to his former employment. It should also be noted that no other physician has treated Claimant. Thus, no other physician has opined that Claimant reached maximum medical improvement, nor has anyone released him to return to his former employment. Furthermore, at the hearing, both parties stipulated that Claimant has not reached maximum medical improvement. (Tr. 7). Finally, in brief, the parties agree that Claimant cannot return to his former employment at this time.

In light of the foregoing, I find that Claimant has not reached maximum medical improvement. I further find that Claimant has established a case of total disability since he cannot return to his former employment. Thus, I find that Claimant is temporarily and totally disabled from April 3, 1998, the date of injury, and continuing through present since suitable alternative employment was not established by Employer. Accordingly, Claimant is entitled to temporary total disability compensation benefits,

based on his average weekly wage, as determined hereinbelow.

D. Average Weekly Wage

At the hearing, the parties stipulated that Claimant's average weekly wage was $1,457.61 at the time of the injury. Thus, I find that Claimant's average weekly wage was $1,457.61. Accordingly, Claimant is entitled to temporary total disability compensation benefits from April 3, 1998, the date of injury, and continuing through present, based on his average weekly wage of $1,457.61 and a corresponding compensation rate of $971.79 ($1,457.61 x 66⅔% = $971.79).

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer has paid Claimant temporary total disability compensation benefits from April 3, 1998 through September 3, 1999. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[8] Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981). In the present matter, Employer filed its notice of controversion on May 14, 1999, during a period of compensation. Employer's filing was timely and therefore, Claimant is not entitled to any penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full

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[8] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from April 3, 1998 and continuing through present, based on Claimant's average weekly wage of $1,457.61, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 3, 1998 work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 26th day of June, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge